SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 191.

MICHAEL U. BOEHMER, PETITIONER,

vs.

PENNSYLVANIA RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Short Statement by Respondent.

Action is under the Federal Employers' Liability Law of 1908, and defendant's answer concedes that at the time and place of the occurrence both plaintiff and defendant were engaged in interstate commerce.

The supposed negligence, upon which plaintiff rests his claim of right to recover, is that on the 8th day of November, 1915, plaintiff was required "to assist in the movement of a car * * * not properly equipped with handholds and steps attached to or near the corners thereof, in accordance with the usual custom and statutes and governmental rules in such case made and provided;" also that defendant had failed to instruct plaintiff that he would be required "to work upon, around, and about cars * * * which were not equipped with footholds, handholds, and steps, at or near all corners thereof" (R., 3).

Defendant denied all negligence on its part, alleged that plaintiff well knew the duties of his position as freight brakeman and the dangers attendant thereon, and that by continuing in defendant's service plaintiff had assumed the risks incident to such employment, such as an accident of the kind here counted upon (R., 6).

On the trial plaintiff testified that he was thirty-two (32) years of age; for fifteen years had been earning his own living at various occupations and was reasonably familiar with the dangers surrounding workingmen (R., 43); had been employed in defendant's signal department for about a year, rated as a carpenter (R., 21), when in September, 1915, he became a brakeman, and after making his "student trips," that is, "one complete round trip

over the entire system—over the main line, and over what we call the creek," he worked as brakeman (R., 20-21) for about two months, until the accident, which occurred November 8, 1915 (R., 3).

The circumstances attending the accident are succinctly, sufficiently, and satisfactorily summed up in the statement of facts made by the learned Circuit Court of Appeals as follows (R., 169):

> "* * * in the night of November 8, 1915 (plaintiff), was employed in switching freight cars at Brocton, N. Y. A refrigerator car, not the property of the defendant, stood upon the nickel plate tracks and was to be transferred into a freight train being made up by one of the defendant's engines and crew to which the plaintiff was detailed. It became necessary to take this car out of the train where it stood and drill it into the proposed train. At some stage of this manœuvre the car was shunted along the track and the plaintiff tried to board it so as to get to the top and put on the brakes. He chose one corner of the car at which there was no grabiron and no sill, putting his hands where he supposed the grabiron would be and his foot where he supposed the sill would be. He fell under the car and his foot was crushed and had to be amputated. It was dark at the time and he carried a lantern. The car in question had a grabiron on each side of the car at one corner, where the pin lever for coupling and uncoupling extends along the end nearly to the corner. It

> had other grabirons on each end of the car at the side opposite to the pin lever and had two ladders, one on each end of the car at the same side as the pin lever" (R., 169-170).

Plaintiff also testified that just previous to the accident he had boarded this car, climbed to its top and set its brake; that he had observed railroad men boarding cars, but had never been instructed to take his lantern and look for handholds on cars (R., 28); after stopping the engine and having set the proper switch he gave the engineer the signal "to back up," using his lamp; "as the car come to me, I put my right foot up and my right hand up, and attempted to board the car; I didn't get hold of anything, and I fell backwards" (R., 33).

Plaintiff while in the service had never observed cars in use "not equipped on all four corners or each side with handholds, ladders, or steps," nor had he been instructed "that cars without handholds and steps on each side, and all four corners, would be used in the trains that" he was to operate (R., 39). After he gave the "back up" signal, the car came towards him "slowly" (R., 57); he did not look to see if there were any grabirons or sill steps (R., 58); he had a copy of the Book of Rules, but was not overly familiar with them (R., 59). Book of Rules was put in evidence by plaintiff (R., 64) and General Rule "O" was read to the jury as follows:

> "Employees must examine, and know for themselves, that the grabirons * * *

> running boards, steps * * * which they are to use * * * are in proper condition * * *" (R., 79, 151).

At the close of the evidence by both parties counsel for defendant moved the court to dismiss the complaint because—

1. Plaintiff had failed to prove the cause of action alleged therein, or any other; had failed to prove and negligence on part of defendant, and had assumed the obvious risks of his employment.

2. Plaintiff had failed to prove any violation of the Safety Appliance Laws (R., 101, 154).

Counsel for defendant also moved the court to direct a verdict for defendant "for no cause of action" on all the above grounds (R., 154).

The latter motion was granted (R., 155) and the jury having returned its verdict under and in accord with such instructions (R., 10) and motion for new trial having been denied (R., 12), judgment was rendered against the plaintiff upon the issues joined (R., 11).

On writ of error to the Circuit Court of Appeals, Second Circuit, the errors assigned were mainly, if not entirely, based upon the alleged failure on part of defendant to see to it that the car in question was equipped "in accordance with the standard un-

der the Safety Appliance Act and the Rules of the Commission" (R., 160, 161).

The Circuit Court of Appeals commenting upon this feature said:

> "The only statutory requirement applicable to this car at the time in question was that of Sec. 4 of the act of March 2, 1893, which provides as follows: 'Until otherwise ordered by the Interstate Commerce Commission it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.'
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> "* * * It appears to us that the language of the section was complied with. It is clear that the number of grabirons was not specified and it is only by the act of April 14, 1910, as amended by that of March 4, 1911, that the number of grabirons could be prescribed by the Interstate Commerce Commission. Since that time the Interstate Commerce Commission has provided that there shall be grabirons on both ends of each side of the car, with sills under them and ladders on each side of each end of the car. THIS, HOWEVER, IS A NEW PROVISION, AND NOT IN EFFECT ON NOVEMBER 8, 1915 (the date of accident). * * * So it seems to us that the only grabirons on the side of the car contemplated by the act of 1893 were the two actually in place on the car in question" (R., 170).

Answering the proposition that defendant owed plaintiff a duty to inform him that some of the cars about which plaintiff would work had sill steps and grabirons on two corners only, while other cars had them on all four corners, the Circuit Court of Appeals said:

> "The proportion between those cars equipped on all four corners and those equipped on two does not appear. We have only the statement of the engineer that he saw several such cars every day, which we accept as equivalent to saying that any man in the service of the company would encounter them daily several times. Therefore as to men whom custom had familiarized with the existing conditions, it can hardly be said that instructions would have added anything to the facts patently and repeatedly before them. If that very custom betrayed them in a given instance, it was for lack of an equipment which should respond to the inevitable inattention that long custom breeds, and such equipment happily now exists. Instructions would not help in such a situation, and we cannot charge the defendant with what would have been an idle thing.
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> "As to green men, the case is different; I have some doubt whether we should assume that they would necessarily observe such relatively exceptional equipment. While it was a most unexpected thing to happen, it seems to me doubtful whether it passes so far beyond possibilities reasonably to be anticipated as to justify its exclusion from that latitude which a jury should be allowed in

fixing fault. The parties did not stand upon an equality in knowledge and there seems to me a question whether the defendant might assume that the exceptional equipment had in less than two months come to the plaintiff's attention, or that he would not be misled by the much greater proportion of modern cars. However, my colleagues believe that as the old style was equally open to his observation, the defendant had the right to assume either that he would not act without looking, or if he had got so far as to establish instinctive habits, that he would have already learned that he could not rely upon a safe support. In any case, they think, he cannot be excused from contributory negligence which, the case in this aspect being at common-law, is a defense."

ARGUMENT.

The accident happened November 8, 1915.

The car immediately concerned was Tropical Refrigerator Express Car 32203, originally numbered 31915, the numbers having been changed October 23, 1915, before date of accident (R., 114, 115).

The car was equipped with standard sill steps and grabirons on the two outside diagonal corners, which bore appropriate relation to the handle of the pin lever for use in coupling and uncoupling cars. It also was equipped with other grabirons, but no sill steps, on each end of the car at the side opposite to the pin lever, and was also equipped

with a ladder at each end of the car on the same side as the pin lever (R., 169, Defendant's Exhibits, photographs numbered 5, 14, 15, 16, 17, and 18, R., 148, 149).

There is no complaint or suggestion that any of this equipment was of improper dimension, or improperly placed or in any manner insecure. Plaintiff's complaint is not leveled against the character or quality of the equipment with which the car was appareled but only insists that there was not enough of it in that (Petitioner's Point 1, his brief, page 20):

> "The Safety Appliance Acts require secure handholds, grabirons and sill steps *at all four corners on the outside.*"

and (Point II, Brief, p. 29):

> "The orders of the Interstate Commerce Commission of March 13, 1911, require (s) handholds, grabirons and sill steps *at all four outside corners of a car.*"

If petitioner is correct in either of these propositions as stated and same are applicable in the circumstances of this case, it is conceded that the concurring judgments of the trial and Circuit Court of Appeals for the Second Circuit were clearly erroneous and should be reversed, but if plaintiff be not correct in either or if correct same are not here applicable, and the use of the car as so equipped was not prohibited by any provision of the Safety

Appliance Acts, or of any order of the Interstate Commerce Commission made pursuant thereto, and the use of such car or cars so equipped was not otherwise forbidden and was not unusual in the movement of freights, then we submit that the concurring judgments of the two lower courts are not clearly erroneous, notwithstanding there may be possible differences in the individual judicial view as to the character and extent of the instructions which an employer might give to adult employees of normal mental development, respecting the presence of dangers cognizable by and obvious alike to the inexperienced and the wise. If neither law nor well-established custom prevailing at the date of the injury complained of (November 8, 1915) required the presence of a grabiron and corresponding sill step at the outside point or corner of the car, where without first looking to ascertain their presence or absence, plaintiff assumed they would be found, then it is submitted defendant was without negligence in the premises, and the concurring judgments of the two lower courts, under the so-called "two-court rule," should be affirmed.

Petitioner brings discussion within narrow limits when he declares (Brief, p. 4) that the case presents but three propositions of law, "each of which is of vital importance to a proper interpretation of Safety Appliance Acts."

We suggest that his first and second propositions present but different phases of the same question, and may well and fairly be paraphrased as fol-

lows: *i. e.*, Did the Safety Appliance acts and orders of the Interstate Commerce Commission in force on November 8, 1915, prohibit the use in interstate commerce of a freight car or cars not equipped with handholds (or) grabirons and sill steps on each of (all four of) its four outside corners?

The pertinent texts for consideration in this connection are as follows:

Section 4 of the act approved March 2, 1893 (27 Stats., 531).

Sections 2 and 3 of the act approved April 14, 1910 (36 Stats., 298).

Two orders of the Interstate Commerce Commission, promulgated March 13, 1911, and simultaneously effective, copies of which will be found in the transcript of record before this court, at pages 173-179, inclusive.

Section 4 of the act of 1893 reads:

> "That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for *greater security to men in coupling and uncoupling cars.*" (Italics supplied.)

Sections 2 and 3 of the act of 1910 read:

> Sec. 2. "That on and after July first, nineteen hundred and eleven, it shall be un-

lawful for any common carrier subject to the provisions of this act to haul, or permit to be hauled or used on its line any car subject to the provisions of this act not equipped with appliances provided for in this act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grabirons on their roofs at the tops of such ladders; *Provided*, That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

Sec. 3. "That within six months from the passage of this act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this act *and section four of the act of March second, eighteen hundred and ninety-three*, and shall give notice of such designation to all common carriers subject to the provisions of this act by such means as the Commission may deem proper, and thereafter said number, location, dimensions, and manner of application as designated by said Commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause

> shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this act; *Provided,* That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act. * * *" (Italics supplied.)

Under his point I (Brief, p. 20) petitioner contends that under the terms of section 4 of the act of 1893 above "it was the duty of the carrier to provide handholds or grabirons on each of the four outside corners of the car, and the failure of the carrier so to provide constituted negligence" (Brief, p. 21). He concedes, as perforce he must, that "It is true that it (the statute, 1893) does not specify the number as one at each of the four outside corners of the car," but adds, "it is obvious that this number was intended."

The two lower courts concurred in thinking otherwise; the wording of the provision is at least as clear and specific as the provisions in acts regulatory of interstate commerce usually are, and no reported opinion construing the requirement otherwise than as set forth in the opinion of the learned Circuit Court of Appeals (R., 170-171) has been or can be cited.

In *Texas Pacific R. Co. vs. Rigsby,* 241 U. S.,

33, 37, the plaintiff's injuries resulted from the use of a *defective,* not *secure,* grabiron or handhold, furnished by the defendant company, and there was no claim that the car about which he was working fell within specified exceptions.

In *St. Joseph, etc., Co. vs. Moore,* 243 U. S., 311, 315, the tender of the engine was totally lacking in the equipment specifically called for by the act of 1893, viz., "grabirons or handholds in the ends and sides of each car," extended to locomotives and tenders by the act of 1903.

In *Illinois Central R. R. vs. Williams,* 242 U. S., 462, the injury resulted from the giving way of the handhold or grabiron upon which Williams relied to descend from the roof safely. Obviously the handhold was not "secure" and just as obviously the use of a car so equipped was forbidden and made unlawful by a section of the act of 1910.

In the case at bar the equipment supplied answered to the full all requirements of section 2 of the act of 1910.

Under the acts of 1893, 1896, and 1903, the location, manner of application, number, sufficiency and dimensions of the various appliances provided for the use of the men was left to the judgment of the many railroad managers, who, as reasonably to be expected, differed with respect to much of detail. Section 2 of the act of 1910 compelled all such sill steps, handholds, grabirons, ladders, etc., appliances as were then in use or thereafter supplied, to be "secure," but the desirability of stand-

ardizing the number, dimensions, location and manner of application of all such equipment was plain and the necessity of some such provisions as are contained in section 3 of the act of 1910 seems obvious. Pursuant to those provisions the Interstate Commerce Commission functioned by issuing its two orders of March 13, 1911, in one of which the requirement to furnish four side handholds of prescribed dimensions located horizontally and "one near each end on each side of car" first appeared, and in the other the period of time within which common carriers were required to fulfill such requirement was fixed at "five years from July 1, 1911, that is to say, effective July 1, 1916, and not before, except, perhaps, under certain conditions as shopping for repairs "amounting to practically rebuilding," the existence of any such condition not being seriously urged here (R., 173, 175, 177).

As the injuries complained of were received November 8, 1915, it is plain that the requirement of section 3 of the act of 1910, as interpreted by the Commission's orders, is not indicative of any then present duty or obligation on part either of the defendant company which did not own, but nevertheless under then existing applicable law, was bound to accept and transport in interstate commerce the car in question, or on part of the owner of the car itself.

It is respectfully submitted that the record presents no question as to matter of fact which

should have been left to the jury; that the direction of the verdict, no cause of action proved, was proper, and that in matter of law no error—certainly no obvious error—tinctures the concurring judgments of the two lower courts.

In such circumstances this court "is not called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible by a minute analysis of the evidence to draw inferences therefrom which may possibly conflict with the conclusions below."

Chicago Junction R. Co. vs. King, 222 U. S., 222.

Southern Railroad Co. vs. Puckett, 244 U. S., 571.

Seaboard Air Line R. Co. vs. Kenney, 240 U. S., 489.

Baughman vs. New York, etc., Co., 241 U. S., 237.

Missouri P. R. Co. vs. Omaha, 235 U. S., 121.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.

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